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In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, *Petitioner*

v.

WARREN V. MOORE AND MRS. WARREN V. MOORE

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The oral opinion of the District Court (R. 11) is not reported. The opinion of the Court of Appeals (R. 14) is reported at 182 F. 2d 332.

JURISDICTION

The judgment of the court below was entered on May 17, 1950 (R. 18). Petitions for rehearing were denied on July 17, 1950 (R. 30). The petition for certiorari was filed on October 5, 1950 and

granted on November 27, 1950 (R. 30). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTION PRESENTED

Whether the judicial authority contained in Section 206(b) of the Housing and Rent Act of 1947, as amended, to issue an "order enforcing compliance" with any provision of that Act or order issued thereunder, empowers a court to order a landlord to make restitution of overceiling rentals received by him in a defense-rental area which was decontrolled after the occurrence of the violations but prior to the filing of the suit against the landlord.

STATUTE INVOLVED

Sections 206(a) and (b) of the Housing and Rent Act of 1947 as amended (61 Stat. 193; 62 Stat. 93; 63 Stat. 18; 50 U.S.C. App. (Supp. III) 1891 *et seq.*) read as follows:

> SEC. 206(a) It shall be unlawful for any person to demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204, or otherwise to do or omit to do any act, in violation of this Act, or of any regulation or order or requirement under this Act, or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

STATEMENT

Respondents, Warren V. Moore and Mrs. Warren V. Moore are landlords of housing accommodations in Dallas, Texas. Between October 1, 1947, and May 31, 1949, they demanded and received rents in excess of those permitted by the applicable maximum rent regulation[1] issued under the Housing and Rent Act of 1947, as amended (hereinafter referred to as "the Act"). Respondents having refused to comply with the Act and regulation, petitioner brought this action against them pursuant to Sections 205 and 206(a) and (b) of the Act for

[1] Controlled Housing Rent Regulation, as amended, 12 F.R. 4331; 13 F.R. 1861; 14 F.R. 1571.

statutory damages, injunctive relief, and for an order of restitution compelling respondents to refund to their tenant the excess of rents collected over the legal maximum. (R. 1.) Prior to the filing of the suit, the Housing Expediter, pursuant to action taken by the City of Dallas under Section 204(j)(3) of the Act,[2] had terminated federal rent controls in that city by amending the Rent Regulation to exclude from its coverage the City of Dallas (14 F. R. 3494). Basing their action on the fact that rental housing in Dallas, Texas, had been decontrolled, respondents moved to dismiss the suit (R. 4). Their motion was denied by the trial court without opinion (R. 6). The suit was thereafter tried and resulted in a judgment directing respon-

[2] Section 204(j)(3), at the time of the decontrol of rental housing in Dallas, Texas, read as follows:

> The Housing Expediter shall terminate the provisions of this title in any incorporated city, town or village upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable legal law and based upon a finding by such governing body reached as the result of a public hearing held after 10 days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town or village; *Provided, however,* That such resolution is first approved by the Governor of the State before being transmitted to the Housing Expediter: *And provided further,* That where the major portion of a defense-rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area. [63 Stat. 21; 50 U.S.C. App. (Supp. III) 1894(j)(3).]

dents to make restitution to the tenant, J. R. Qualls, in the amount of $1,093.48, and because of "some evidence * * * of wilfulness" (R. 12) the court further directed petitioners to pay to the United States statutory damages in the amount of $50.00 (R. 6-7). Respondents appealed from this judgment (R. 7).

The Court of Appeals reversed the judgment of the trial court and remanded the cause with directions to dismiss the suit in so far as it sought a prohibitory injunction and restitution of overceiling rentals (R. 18).[3] The Court of Appeals rested its decision on the theory that restitution of overceiling rentals is merely ancillary or adjunctive to injunctive relief and cannot be ordered in the absence of power to grant an injunction. Consequently, it held that since the Housing Expediter had been "shorn of all power to enforce * * * control in the future" in Dallas, Texas, by the termination of rent control in that city, the trial court was without authority in this case to grant an injunction against future violations of the Act and hence without power to order restitution of the illegal rentals (R. 14-18).

[3] The petition for certiorari filed herein is directed solely to the ruling of the court below on respondent's appeal with respect to the order for restitution. Petitioner filed a cross-appeal from that part of the trial court's judgment which gave statutory damages for less than the amount of the established overcharges. The ruling of the court below on the cross-appeal, 182 F. 2d 336, is not challenged here.

SUMMARY OF ARGUMENT

I

In *Porter* v. *Warner Holding Co.*, 328 U.S. 395, this Court construed a statutory provision almost identical with that under which the present action was brought to authorize an order of restitution of rental overcharges to the injured tenant. It held that such an order was proper on *either* of two theories, (1) it might be "considered as an equitable adjunct to an injunction degree" (p. 399) or (2) it might be "considered as an order appropriate and necessary to enforce compliance with the Act" (p. 400). By its reference to the second of these theories, the Court plainly intended to hold that restitution could be obtained independently of whether a prohibitory injunction was also appropriate. With the exception of the decision below, the Courts of Appeals have uniformly so construed this Court's holding.

The court below rested its decision denying restitution on the ground that at common law restitution could not be recovered in an independent action but was ancillary to some other proceeding. Here no cause of action for prohibitory injunction existed because the area in question had been decontrolled prior to the institution of the suit. Consequently, there was, in the court's view, no occasion for the exercise of equity jurisdiction. This rationale appears inconsistent with the court's own decisions in other cases and is dubious as a matter

of common law. More important, it ignores the fact that "the powers invoked were not precisely the ordinary equity powers, but those established by * * * the Act", *Creedon* v. *Randolph*, 165 F. 2d 918, 919 (C.A. 5). In fashioning remedies to effectuate a statutory policy, courts are invested with a high degree of flexibility to adapt their orders to particular situations. Nothing in the statutory policy suggests any reason why the availability of the remedy of restitution should be dependent on whether a prohibitory injunction is appropriate in the same case. Restitution was held available because "the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums." *Porter* v. *Warner Holding Co., supra*, at 400. To the effectuation of that purpose, it is irrelevant whether the situation is one in which there is need to enforce future compliance by a prohibitory injunction.

II

Nothing in the decontrol of the applicable area renders the remedy of restitution unavailable to redress violations of the Act which occurred at a time when that area was subject to control. Section 204(f) of the Act, and the General Saving Clause (1 U.S.C. Section 109, 61 Stat. 633), expressly preserve, after termination of the statute, the right to redress past violations. The policy

embodied in those provisions has been applied to cases of revocation or termination of a regulation. No reason appears in the statute or its legislative history for a refusal to apply this policy to violations occurring in areas which were subsequently decontrolled.

ARGUMENT

I. Section 206(b) of the Housing and Rent Act of 1947 empowers the court, on suit by the United States, to award restitution to a tenant of any excessive rentals charged, regardless of whether a prohibitory injunction is sought or awarded.

Section 206(b) of the Housing and Rent Act of 1947 authorizes the United States to apply to any court for an injunction or for "an order enforcing compliance with" any provision of the Act, or any regulation or order issued thereunder, and empowers the court to issue an injunction or "other order." In *Porter* v. *Warner Holding Co.*, 328 U.S. 395, this Court considered Section 205(a) of the Emergency Price Control Act of 1942—a provision which, for all purposes here material, was worded identically with Section 206(b) of the present Act. In that case the Administrator had sought both an injunction restraining future violations and restitution to the appropriate tenants of excessive rents collected. This Court held that an order of restitution was a proper "other order" under that section "on *either* of two theories," (1) it might be "considered as an equitable adjunct to

an injunction decree" (p. 399), or (2) it might be "considered as an order appropriate and necessary to enforce compliance with the Act." (p. 400)[4]

With respect to the second of these theories, the Court pointed out that "Section 205(a) anticipates orders [to enforce compliance with the Act], although it makes no attempt to catalogue the infinite forms and variations which such orders might take," and said that "the problem of formulating these orders has been left to the judicial proces of adapting appropriate remedies to specific situations" (p. 400). It added:

> * * * In framing such remedies under § 205(a), courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved. The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. *Clark* v. *Smith*, 13 Pet. 195, 203. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to

[4] It has also been suggested that an order of restitution may be regarded as a "mandatory injunction" and hence within the statutory authority to issue injunctions. *Creedon* v. *Randolph*, 165 F. 2d 918, 919 (C. A. 5).

> its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains; and the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums. [p. 400]

Thus, under the Court's second theory, it is clear that restitution may be awarded as "appropriate and necessary to enforce compliance with the Act and to give effect to its purposes" regardless of whether a prohibitory injunction is sought or obtained. This Court's reference to the second theory would have been both meaningless and misleading if restitution had been deemed permissible only when ancillary to the grant of a prohibitory injunction. In this connection, it is significant that in *Bowles* v. *Skaggs*, 151 F. 2d 817, which this Court cited with approval (328 U.S. at 402) and for conflict with which the petition had been granted in the *Warner Holding Co.* case (328 U.S. at 397), the Sixth Circuit had held that restitution could be awarded although no prohibitory injunction had been sought, and indeed none would have been appropriate since the violation was an isolated act.[5]

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[5] The provisions which had been before this Court in *Warner Holding Co.* (decided June 3, 1946) were incorporated without material change in the 1947 Act and were continued in

With the exception of the present case, the decisions of the various courts of appeals have been unanimous in upholding the power to award restitution, under Section 205(a) of the 1942 Act or Section 206(b) of the 1947 Act, regardless of whether a prohibitory injunction was or could be issued. They have done so in cases in which an injunction was inappropriate because there was no likelihood of future violation, *Bowles* v. *Skaggs, supra; Creedon* v. *Randolph,* 165 F. 2d 918 (C.A. 5), and in cases in which an injunction could not issue because the Act had expired or controls had been removed. *Woods* v. *Wolfe,* 182 F. 2d 516 (C.A. 3); *Woods* v. *Wayne,* 177 F. 2d 559 (C.A. 4); *Jackson* v. *Woods,* 182 F. 2d 338 (C.A. 5); *Miller* v. *United States,* No. 13,283 (C.A. 5, January 10, 1951); *Brooks* v. *Woods,* No. 9589 (C.A. 7,

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force through the extensive revision and reexamination of the Act made in 1948, 1949 and 1950. Indeed in connection with the 1948 amendments the availability of the restitution remedy was clearly recognized. The Senate Report (No. 896, 80th Cong. 2d Sess.) recommends extension of "the power granted by existing law to apply for injunctions or compliance orders" (p. 3). And on the Senate floor Senator Cain, chairman of the subcommittee which had had the bill under consideration pointed out that "the usual order received upon a successful petition for an injunction merely required the landlord to repay to the tenant the overcharge of rent made by the landlord." 94 Cong. Rec. 1602. In such circumstances legislative approval of this Court's decision is to be presumed. *National Labor Relations Board* v. *Gullett Gin Co.,* No. 122, 1950 Term, p. 5 and cases cited.

order of affirmance entered October 13, 1948, not reported); *Ebeling* v. *Woods*, 175 F. 2d 242 (C.A. 8); *Woods* v. *Richman*, 174 F. 2d 614 (C.A. 9); *Woods* v. *Gochnour*, 177 F. 2d 964 (C.A. 9); *Emery* v. *United States*, No. 12,522 (C.A. 9), January 22, 1951; see also *Woods* v. *Davis*, No. 12,626 (C.A. 9, November 28, 1950).[6]

The decision below appears at least to question, if not to repudiate, all of these decisions. The court seems to have rested its holding that restitution is unavailable on the premise that restitution is not "in and of itself a cause of action, of which equity has jurisdiction," but merely "a type of *relief* afforded as an incident to suits at law as well as in equity." "In other words, restitution is ancillary, auxiliary, incidental, or adjunctive to a cause of action of which equity has jurisdiction" (R. 15). From this premise the court concluded that since there was no longer "a right to an injunction to prevent violations and enforce control in an area that had lawfully been decontrolled," "there remained no proceeding of which equity would have jurisdiction to which restitution could be adjunctive." (R. 17)

The court's reasoning in the case below would appear to be inconsistent with its own prior, con-

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[6] Similarly, restitution has been granted under the identically worded provision of section 7 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 211, 50 U. S. C. App. 1827, after that Act had expired. E.g., *United States* v. *Carter*, 171 F. 2d 530 (C. A. 5); *Keele* v. *United States*, 178 F. 2d 766 (C. A. 5).

temporaneous and subsequent decisions. Thus, in *Creedon* v. *Randolph, supra,* decided before the decision below, the court pointed out that the Administrator "did not ask for a prohibitory injunction against future violations, and probably would not have gotten it if he had" (p. 919). For that reason, the District Court had denied restitution on the ground that "here no equitable relief is sought * * *. There is therefore no legal basis for this court to exercise the traditional equity powers and in so doing order restitution." The Court of Appeals, reversing the lower court's decision, pointed out that "the powers invoked were not precisely the ordinary equity powers, but those established by Section 205(a) of the Act," and that accordingly, restitution could be allowed as appropriate to enforce compliance. (*Ibid.*) In *Jackson* v. *Woods, supra,* decided on the same day as the decision below, and *Miller* v. *United States, supra,* decided subsequently, the court similarly allowed restitution where, although a prohibitory injunction was originally sought, none could have been granted because the area had been decontrolled by the time of entry of judgment.[7]

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[7] With reference to the assertion of inconsistency in its decisions the court said in *Miller* v. *United States,*

> By the argument of the parties in this Court, two cases heretofore decided by this Court upon the power to direct restitution of rental overcharges are brought to the forefront as controlling. There is no dispute that the decision in *Jackson* v. *Woods,* 182 F. 2d 328, deals with the

In addition to this apparent inconsistency with other decisions of the same court, the court's rationale is dubious even as an exposition of common

precise factual situation here involved. However, the appellants confidently rely upon the decision of this Court in *Moore* v. *United States*, 182 F. 2d 332. Both of these opinions were published on May 17, 1950, and both were determined by the same division of this Court. Consideration of these two cases shows that the only factual difference in them is that the complaint in the *Jackson* case was filed, as was the one in the present case, prior to the termination of rental control, whereas the complaint in the *Moore* case was filed after rent control had terminated. The Government contends that in any event, because of identity of the factual situation, the *Jackson* case is controlling and that the trial court properly relied upon its authority, but nevertheless contends that the *Moore* decision is not sound and should be reconsidered. The appellants by their reliance upon the *Moore* case, and thus that the *Jackson* case should not be controlling, in effect agree with the Government's contention that the time of the institution of the suit is not legally determinative of the power of the Court to direct restitution. Upon the argument of this case it was made to appear that the Supreme Court had theretofore granted a writ of certiorari to bring the *Moore* decision before it for review. In these circumstances, and since the present case falls squarely within the decision in the *Jackson* case, *supra*, we will not attempt to reconsider the decision in the *Moore* case. There is no necessity to do so at this time. We accede neither to the request of the Government to reconsider the *Moore* case, or of the appellants to apply its principles in the present case. We here apply to the identical situation the ruling announced in the *Jackson* case, *supra*. It follows therefrom that we affirm the judgment of the trial court ordering restitution to be made, even though entered after the termination of rent control.

law, in which an independent action for restitutionary relief was by no means unknown.[8] More important, however, it ignores the fact that in fashioning remedies to effectuate a statutory policy the courts are not limited by the ancient and largely outmoded distinctions between law and equity. The jurisdiction of the court rests on the statutory provision empowering the United States to bring a proceeding to enforce compliance with the Act, and the authority of the court to award restitution rests also on the statutory grant of authority to enter such "other order" as it deems appropriate. See *Creedon* v. *Randolph*, *supra*. Thus, whenever the remedy of restitution is appropriate to enforce compliance, the statute confers jurisdiction to award it.[9]

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[8] E.g., action at law on the common counts to recover money paid under mistake or duress, action at law for replevin, action at equity to impress money or property with a constructive trust. See generally Restatement of Restitution, Introductory Note, pp. 4-10; Sections 4 and 5, pp. 17-23.

[9] For other examples of statutory remedies in the nature of restitution, see:

(1) Actions under Section 2(a)(6) of the Second War Powers Act, as amended, 56 Stat. 177, 50 U.S.C. App. 633. That section's grant of jurisdiction "of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection . . ." has been held to authorize an independent suit by a purchaser for restitution of overpayments in violation of a priorities regulation. *Heinecke* v. *Parr*, 168 F. 2d 194 (C.A. 6); *Keele* v. *Holt*, 171 F. 2d 486 (C.A. 5).

(2) Orders under Section 10(e) of the National Labor Relations Act, 61 Stat. 147, 29 U.S.C. (Supp. III) 160(e). Al-

While this Court, in *Warner Holding Co.*, emphasized that the courts had available to them the full arsenal of remedies which had been created by courts of equity, nothing in its decision suggests

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though the Act authorizes the Board to direct "reinstatement of employees with or without back pay," back pay has been awarded in situations in which reinstatement is either impossible or inappropriate, e.g., *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233 (C.A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Atlantic Towing Co.*, 179 F. 2d 497 (C.A. 5), opinion amended in other respects, 180 F. 2d 726, rehearing denied, 182 F. 2d 625. Reinstatement and back pay have also been awarded to persons assumed to be no longer treated as employees under the Act (see *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571, 575 (C.A. 6), certiorari denied, 335 U.S. 908; *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131, 136-137 (C.A. 4); *National Labor Relations Board* v. *Universal Camera Corp.*, 179 F. 2d 749 (C.A. 2), certiorari granted, 339 U.S. 962, No. 40, 1950 Term.

Similarly the Board, under its general power to enter orders which "will effectuate the policies of the Act," has ordered reimbursement of checked-off dues. In sustaining such an order, this Court emphasized that it is "wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order." *Virginia Electric Co.* v. *National Labor Relations Board*, 319 U.S. 533, 543.

(3) Actions under Section 2 of the Walsh-Healy Act, 49 Stat. 2037, 41 U.S.C. 36, to require payment, into a fund available for employees, of the amount of "any deductions, rebates, refunds, or underpayment of wages."

(4) Actions under the Fair Labor Standards Act, in which authority to award restitution has been implied from the grant of jurisdiction to enjoin violations. E.g., *Walling* v. *O'Grady*, 146 F. 2d 422 (C.A. 2); *McComb* v. *Frank Scerbo & Sons*, 177 F. 2d 137 (C.A. 2); cf. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193. But see the 1949 amendments,

that the statutory jurisdiction to enter orders appropriate to enforce compliance with the Act is limited to cases which would, apart from statute, have been within the jurisdiction of a court of equity.[10] This Court has often emphasized the flexibility with which a district court, in the effectuation of a statutory policy, should adapt its remedy to the needs of the situation before it. E.g., *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 726; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189; cf., *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. And in other situations courts have not hesitated, in the implementation of statutory rights, to entertain proceedings for which there was no direct non-statutory precedent.[11]

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63 Stat. 919, 29 U.S.C. (Supp. III) 217, withdrawing jurisdiction to issue such restitution orders.

(5) Actions for reparations under the Interstate Commerce Act, 49 U.S.C. 9; the Communications Act, 47 U.S.C. 206, 209, 407; the Packers and Stockyards Act, 7 U.S.C. 209; the Shipping Act, 46 U.S.C. 821, 829, and the Water Carriers Act, 49 U.S.C. (Supp. III) 908.

[10] Compare: "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Yakus* v. *United States*, 321 U.S. 414, 441, quoting *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515, 552.

[11] See, for example, proceedings under Section 17 of the Trading with the Enemy Act, 40 Stat. 425, 50 U.S.C. App. 17 (conferring jurisdiction on the courts to make such orders and decrees "as may be necessary and proper * * * to enforce

We can perceive no reason for holding that the availability of the remedy of restitution should, as a matter of statutory policy, depend on whether injunctive relief is appropriate in the same case. Restitution at the suit of the United States is available in addition to a suit for damages by the injured party because "the Administrator acts in the public interest—the purchaser in his own. . . . There are undoubtedly many instances where the relationship of buyer and seller is such that the buyer is deterred from vindicating his own and therefore also the public right." *Bowles* v. *Skaggs*, *supra*, at 821. Indeed, this is particularly so in areas where the continuing landlord-tenant relationship is no longer subject to the Act's controls. Nor is restitution concerned solely, as the court below thought, with insuring future compliance. While this Court in the *Warner Holding Co.* case indicated that that was one respect in which a resti-

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the provisions of this Act"). Among the types of proceedings entertained under that section are actions to require the summary transfer to the Alien Property Custodian of specific property, e.g., *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554, or of the amount of a debt, e.g., *McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241, or to require summary issuance to him of new certificates of stock, cf. *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, subject to later plenary adjudication of his rights in another proceeding. Similarly, state probate and other courts which would otherwise have plenary jurisdiction over property, have, on demand by the Custodian, ordered it summarily turned over to him. *Matter of Daly*, 189 Misc. 680, 74 N.Y. Supp. 2d 711; *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N.Y. Supp. 2d 289.

tution order would give effect to the Act's purposes, it also pointed out that "the statutory policy of preventing inflation is plainly advanced if prices or rents which have been collected in the past are reduced to their legal maximums" (328 U.S., at 400). To the effectuation of that purpose, it is irrelevant whether the situation is one in which there is a need to enforce future compliance. It is sufficient that there have been overcharges in the past which may, by an order of restitution, be "reduced to their legal maximums."

II. The remedy of restitution is available notwithstanding the fact that the Dallas area has been decontrolled.

As we have seen, restitution is an independent statutory remedy which is available regardless of whether other remedies, such as a prohibitory injunction, are requested or appropriate. Consequently, nothing in the fact that the Dallas, Texas, area has been decontrolled renders that remedy inapplicable to redress violations of the Act which occurred at a time when the area was subject to control. This result is made clear by the saving provision of Section 204(f) of the Act (50 U.S.C. App., Supp. III, 1894(f)), which provides that after termination of the Act, all of its provisions, and all regulations and orders issued thereunder, are maintained in full force and effect "for the purpose of sustaining any proper suit or action with respect to any right or liability incurred

prior to the termination date." [12] Like the similar provision of Section 1(b) of the Emergency Price Control Act of 1942, this provision is clearly applicable "whether or not suit is started prior to the termination date of the Act." *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 119; see also, *Woods* v. *Hills*, 334 U.S. 210. The same result is achieved by the General Saving Clause, 1 U.S.C. §109, 61 Stat. 635,[13] which is incorporated into every subsequent statute unless denied application by the terms or clear implication of that statute. *Great Northern Ry Co.* v. *United States*, 208 U.S. 452, 465; *Hertz* v. *Woodman*, 218 U.S. 205, 217; *National Labor Relations Board* v. *National Garment Co.*, 166 F.

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[12] Section 204(f) was amended by the Act of June 23, 1950, P. L. 574, 81st Cong., 2d sess., in minor respects, and renumbered as Section 204(f)(4), which now provides as follows:

> (4) Notwithstanding any provision of paragraph (1) or (3) of this subsection, the provisions of this title and regulations, orders, and requirements thereunder shall be treated as still remaining in force for the purpose of sustaining any proper suit or action with respect to any right or liability incurred prior to the termination date specified in such paragraph.

Paragraphs (1) and (3) of subsection (f) provide, respectively, that the provisions of the Act shall cease to be in effect at the close of December 31, 1950 (with exceptions not here material), or upon the date of a presidential proclamation or concurrent resolution of both houses of Congress. By the Act of June 23, 1950, Public Law 574, 81st Cong., 2d Sess., the Act was extended to June 30, 1951.

[13] "§ 109. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still

2d 233, 237 (C.A. 8), certiorari denied, 334 U.S. 845; *United States* v. *Carter*, 171 F. 2d 530, 532 (C.A. 5); *United States* v. *McNair*, 180 F. 2d 273, 274 (C.A. 9).[14]

These provisions reflect a deliberate legislative rejection of the common law presumption that repeal of a statute is intended as a legislative pardon for past actions (see *United States* v. *Hark*, 49 F. Supp. 95, 97 (D. Mass.), reversed, 320 U.S. 531). The policy which they embody applies equally to cases of revocation or termination of a regulation. *United States* v. *Hark*, 320 U.S. 531; *Utah Junk Co.* v. *Porter*, 328 U.S. 39.[15] No reason appears in the statute or its legislative history for a refusal to apply this policy to violations occurring in areas which were subsequently decontrolled. Indeed, since the statute and its underlying policy remain

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remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

[14] This is so notwithstanding the inclusion in the statute of a specific saving clause. *Great Northern Ry. Co.* v. *United States*, *supra*.

[15] See also, *United States* v. *Cream Products Distributing Co.*, 156 F. 2d 732 (C.A. 7); *Fredrick* v. *United States*, 163 F. 2d 536, 543 (C.A. 9), certiorari denied, 332 U.S. 775; *Crary* v. *Porter*, 157 F. 2d 410 (C.A. 8); *Rodgers* v. *United States*, 158 F. 2d 835 (C.A. 6).

in general effect, notwithstanding decontrol in particular areas, it would seem to follow, *a fortiori*, that violations occurring in such areas prior to decontrol should continue to be remedied.[16]

As this Court indicated in a criminal case, the policy underlying such saving clauses is that if past violations are left unpunished, the Act "would lose, as a practical matter, some of its sanctions. Violations could occur with impunity months before its expiry, for in practice there frequently is an unavoidably substantial lag between violation and prosecution." (*United States* v. *Powers*, 307 U.S. 214, 217.) These principles apply equally to the civil remedies contemplated by the Act. To deny the availability of those remedies in areas which were decontrolled after the violation occurred would discriminate in favor of those landlords who succeeded, for a time, in keeping their violations undetected, and would, to the extent that the excessive rentals are not restored to the tenant, promote rather than prevent inflation during the period of control.

Respondents contend that the saving clause is inapplicable here because the provision of Section 204(j)(3) that "the Housing Expediter shall terminate the provisions of this title," pursuant to which decontrol was here made, necessarily termi-

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[16] Compare *Fleming* v. *Mohawk Co.*, *supra*, at 119: "Though most of the controls have been lifted, the Act is still in effect. Liabilities incurred prior to the lifting of controls are not thereby washed out."

nated the savings clause itself. The argument was not accepted by the court below for, in this very action, it awarded statutory damages (R. 17-18).[17] In any event, the argument is without merit. The Housing Expediter, in terminating controls in a city pursuant to action taken for the purpose by a local governing body, does not repeal the statute.[18] Only Congress may repeal an Act. The Expediter's action is, in both form and effect, an amendment of his regulation so as to delete the name of the city from the schedule of cities covered by the regulation (14 F. R. 3494). It is thus precisely comparable to the amendment or revocation of a regulation involved in such cases as *United States* v. *Hark, supra.* Moreover, the argument ig-

[17] The Fifth Circuit would also apply the saving clause to permit restitution actions in decontrolled areas where the suit was brought prior to the decontrol. See *Jackson* v. *Woods*, and *Miller* v. *United States*, both cited *supra*, p. 13. Any distinction between cases in which the suit was brought prior to and subsequent to the decontrol is clearly contrary to this Court's statement in *Fleming* v. *Mohawk Co.*, *supra*, that the saving clause applies "whether or not suit is started prior to the termination date of the Act" (331 U.S. at 119).

[18] Respondents suggest that the phrase "Housing Expediter shall terminate" in Section 204(j)(3) is significantly different for present purposes from the provisions of Section 204(j)(1) and (2) which, in the case of decontrol of entire states, merely call upon the Expediter to make an announcement of the decision of the state. This suggestion is without merit in either logic or legislative history. The difference in language would appear to be attributable to a desire that, in the case of decontrol of municipalities, the Expediter should exercise a more affirmative authority than in the case of decontrol of states.

nores the effect of the General Saving Clause, which would remain applicable here regardless of any termination of the provisions of this Act. (See p. 20, *supra.*)

CONCLUSION

To allow the decision below to stand would thwart effective compliance with the Act and impede the statutory policy of preventing inflation. It would constitute an invitation to landlords whose violation was innocent to defer voluntary compliance when overcharges are brought to their attention, in the hope that the areas in which their property is situated will be decontrolled before action is instituted by the Expediter for restitution. It would likewise reward wilful violators and place a premium upon their astuteness in concealing violation until decontrol has taken place.[19]

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[19] Decontrol actions for the nation effective to and including September 8, 1950, undertaken by the various methods provided by the Act are set forth below:

Cumulative April 1, 1949, to September 8, 1950	Actions	Estimated Units	1940 Population
Expediter Initiative	554	1,351,901	15,822,865
Local Option	330	1,317,746	6,650,411
Local Option (County)	1	3,188	47,565
State Option	10	3,489,368	19,876,818
Board Recommendation	6	84,419	559,842
Total	901	6,246,622	42,957,501

Presumably the ruling of the court below would govern in the Fifth Circuit regardless of the manner in which the decontrol of a defense-rental area has been brought about.

Clearly, compliance is not achieved if the violator is permitted to reap the benefits of his wrongdoing, whether it be in controlled or decontrolled areas. Neither the words of the Act, precedent, nor sound reason support the conclusion reached by the court below. Accordingly, the judgment below should be reversed with instructions to reinstate the judgment of the District Court awarding restitution of rental overcharges.

Respectfully submitted,

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